IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

Supreme Court, U.S.
FILED
MAR 30 1984
ALEXANDER L. STEVAS
CLERK

No. 83-6413

CHRISTOPHER A. BURGER,

Petitioner,

v.

WALTER ZANT, WARDEN,
GEORGIA DIAGNOSTIC AND
CLASSIFICATION CENTER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION FOR THE RESPONDENT

WILLIAM B. HILL, JR.
Senior Assistant
Attorney General
Counsel of Record
for the Respondent

MICHAEL J. BOWERS
Attorney General

JAMES P. GOOGE, JR.
Executive Assistant
Attorney General

MARION O. GORDON
First Assistant
Attorney General

SUSAN V. BOLEYN
Assistant
Attorney General

Please serve:

WILLIAM B. HILL, JR.
132 State Judicial Bldg.
40 Capitol Square, S.W.
Atlanta, Georgia 30334
(404) 656-3359

defendants. Further, though an obvious fact, Respondent notes that Petitioner has conspiciously failed to note in his brief that he and his companion in the murder received separate trials before separate juries and were in fact represented by separate attorneys.

With reference to the proper legal standard to be utilized in evaluating an allegation of conflict of interest, the courts below correctly noted:

> A conflict of interest must be actual rather than speculative before the constitutional guarantees of effective assistance of counsel are implicated.

Zuck v. Alabama, 588 F.2d 436, 439 (5th Cir. 1979).

Further, in United States v. Alvarez, 580 F.2d 1251 (5th Cir. 1978), citing Foxworth v. Wainwright, 516 F.2d 1072 (5th Cir. 1975) and United States v. Fannon, 491 F.2d 129 (5th Cir. 1974), cert. denied, 419 U.S. 1012 (1974) the court appropriately opined that:

> Although an accused is entitled to counsel free of conflict and obligations, not every conflict in representation will be so egregious as to constitute a violation of the Sixth Amendment. For example, joint representaion of co-defendants is not a per se violation of the Sixth Amendment.

United States v. Alvarez, supra at 1255.

In an attempt to meet his burden of demonstrating an actual conflict of interest under which Mr. Leaphart allegeldy labored, Petitioner presented the testimony of Mr. Leaphart at the federal habeas corpus evidentiary hearing. The Petitioner's obvious intention in calling Mr. Leaphart as a

1.

Whether this Court should grant a writ of certiorari to review Petitioner's contention that he was rendered the ineffective assistance of counsel, which contention has been found to be totally without merit by every state and federal habeas corpus court?

2.

Whether this Court should grant a writ of certiorari to review Petitioner's contention that in Godfrey v. Georgia, 446 U.S. 520 (1980) this Court ruled O.C.G.A. § 17-10-30(b)(7), former Ga. Code Ann. § 27-2534.1(b)(7), to be unconstitutional on its face?

3.

Whether this Court should grant a writ of certiorari to review Petitioner's contention that the trial court's charge impermissibly shifted the burden of proof on the element of intent, which contention has been found to be totally without merit by every state and federal reviewing court?

Page(s)

QUESTIONS PRESENTED i

STATEMENT OF THE CASE 1

REASONS FOR NOT GRANTING THE WRIT:

I. PETITIONER'S CONTENTION THAT HE WAS RENDERED THE INEFFECTIVE ASSISTANCE OF COUNSEL HAS BEEN PROPERLY FOUND TO BE TOTALLY WITHOUT MERIT BY EVERY STATE AND FEDERAL HABEAS CORPUS COURT 10

II. PETITIONER'S CONTENTION THAT IN GODFREY V. GEORGIA, 446 U.S. 520 (1980) THIS COURT RULED O.C.G.A. § 17-10-30(b)(7), FORMER GA. CODE ANN. § 27-2534.1(b)(7) TO BE UNCONSTITUTIONAL ON ITS FACE, IS DERIVED FROM A MISREADING OF GODFREY V. GEORGIA, SUPRA AND IS WITHOUT MERIT. 20

III. PETITIONER'S CONTENTION THAT THE TRIAL COURT'S CHARGE IMPERMISSIBLY SHIFTED THE BURDEN OF PROOF ON THE ISSUE OF CRIMINAL INTENT HAS BEEN PROPERLY FOUND TO BE TOTALLY WITHOUT MERIT BY EVERY STATE AND FEDERAL REVIEWING COURT. 22

CONCLUSION 32

CERTIFICATE OF SERVICE 33

Cases Cited: Page(s)

Blake v. Zant, 513 F.Supp. 772 (S.D. Ga. 1981). . . . passim

Burger v. State, 242 Ga. 28, 247 S.E.2d 834 (1978). . 1, 4, 14

Burger v. State, 245 Ga. 458, 265 S.E.2d 796 cert. denied, 448 U.S. 913 (1980) 4

Burger v. Zant, 718 F.2d 979 (11th Cir. 1983) 3

Connecticuit v. Johnson, ___ U.S. ___, 103 S.Ct. 969 (1983) 31

Cupp v. Naughten, 414 U.S. 141 (1973) 29

Foxworth v. Wainwright, 516 F.2d 1072 (5th Cir. 1975) 11

Gideon v. Wainwright, 372 U.S. 335 (1963) 15

Godfrey v. Georgia, 446 U.S. 520 (1980) 20, 21

Godfrey v. Georgia, 446 U.S. 520 (1980) 20, 21

Hammondtree v. Phelps, 605 F.2d 1371 (5th Cir. 1979). 28

Koehler v. Engle, 707 F.2d 241 (6th Cir. 1983), cert. granted ___ U.S. ___, 104 S.Ct. 231 (1983). . . 22, 23

Mays v. Balkcom, 631 F.2d 48 (5th Cir. 1980). 15

Powell v. Alabama, 287 U.S. 45 (1932) 15

Proffit v. Wainwright, 685 F.2d 1227 (11th Cir. 1982) 15

Sandstrom v. Montana, 442 U.S. 510 (1979) 23, 26, 27, 29

Skrine v. State, 244 Ga. 520, ___ S.E.2d ___ (1979) . 29

Stanley v. Zant, 697 F.2d 955 (11th Cir. 1983). . . . 15

Stephens v. Zant, 631 F.2d 397, modified on panel rehearing, 648 F.2d 446 (5th Cir. 1981) 2

United States v. Alvarez, 580 F.2d 1251 (5th Cir. 1978) 11

United States v. Chiantese, 560 F.2d 1244 (5th Cir. 1977) 26

United States v. Fannon, 491 F.2d 129 (5th Cir. 1974) cert. denied, 419 U.S. 1012 (1974). 11

Ulster County Court v. Allen, 442 U.S. 140 (1979) . . 26, 27, 28, 29

United States v. Killian, 639 F.2d 206 (5th Cir.) cert. denied, 451 U.S. 1021, 101 S.Ct. 3014, 69 L.Ed.2d 394 (1981) 15

Washington v. Strickland, 693 F.2d 1243 (5th Cir. Unit B 1982)(en banc), cert. granted, ___U.S.___, 103 S.Ct. 2451, 77 L.Ed.2d 1332 (1983). 15

Zuck v. Alabama, 588 F.2d 436 (5th Cir. 1979) 11

Zant v. Stephens, ___ U.S. ___, 103 S.Ct. 2733, 77 L.Ed. 235 (1983) 20, 21

STATUTES CITED:

O.C.G.A. § 17-10-30(b)(7); Ga. Code Ann. 27-2534.1(b)(7) 20, 21

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

No. 83-6413

CHRISTOPHER A. BURGER,

Petitioner,

v.

WALTER ZANT, WARDEN,
GEORGIA DIAGNOSTIC AND
CLASSIFICATION CENTER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION FOR THE RESPONDENT

PART ONE

STATEMENT OF THE CASE

The Petitioner was convicted of murder in the Superior Court of Wayne County, Georgia on January 25, 1978. A sentence of death was imposed. On direct appeal to the Supreme Court of Georgia the Petitioner's conviction was affirmed; however, the Petitioner's sentence of death was vacated and a new trial was ordered as to punishment at Burger v. State, 242 Ga. 28, 247 S.E.2d 834 (1978).

The Petitioner was subsequently retried on the issue of punishment and on July 19, 1979 the Petitioner was again sentenced to death. On direct appeal from the reimposition of the death penalty the Supreme Court of Georgia affirmed the Petitioner's sentence at Burger v. State, 245 Ga. 458, 265 S.E.2d 796, cert. denied, 448 U.S. 913 (1980).

State habeas corpus relief was denied on October 1, 1980 by the state habeas corpus court, which denial of relief was

affirmed by the Supreme Court of Georgia on that same date. From the denial of habeas corpus relief in the state courts, on October 2, 1980 the Petitioner filed an application for habeas corpus relief in the United States District Court for the Southern District of Georgia, Brunswick Division.

After conducting an extensive evidentiary hearing on March 4, 1981 the district court, on April 29, 1981 rendered its Order and Judgment granting the Petitioner habeas corpus relief in the form of an Order vacating Petitioner's sentence of death. The district court afforded habeas corpus relief in this regard based solely upon the circuit court's decision in Stephens v. Zant, 631 F.2d 397, modified on panel rehearing, 648 F.2d 446 (5th Cir. 1981).[1] The district court denied Petitioner's request for habeas corpus relief on all other allegations contained in his petition.

On May 11, 1981 the Respondent filed his notice of appeal from the district's granting of habeas corpus relief in the form of an Order vacating Petitioner's sentence of death. Petitioner filed a timely cross-appeal from that portion of the district court's Order denying habeas corpus relief on all other allegations contained in the petition.

On October 13, 1983, after extensive briefing and oral argument, the United States Court of Appeals for the Eleventh

---

[1]On Argument before the United States Court of Appeals for the Eleventh Circuit, counsel for the parties agreed that this Court's then pending decision in Zant v. Stephens, __ U.S. ___, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983) would control dispostion of the sole basis upon which habeas corpus relief was afforded by the district court. As is revealed by an examination of the circuit court's opinion below at Burger v. Zant, 718 F.2d 979, 982 (11th Cir. 1983), in light of this Court's opinion in Zant v. Stephens, supra, the district court's grant of habeas corpus relief was reversed.

Circuit rendered its opinion reversing the district court's granting of habeas corpus relief. Burger v. Zant, 718 F.2d 979 (11th Cir. 1983).

On February 13, 1984, Petitioner's petition for rehearing and suggestion for rehearing en banc was denied. On February 27, 1984 the circuit court denied Petitioner's request to stay the mandate pending filing of an application for a writ of certiorari in this Court. On March 6, 1984, upon receipt of the mandate of the circuit court, the district court entered its Order making the judgment of the United States Court of Appeals for the Eleventh Circuit the judgment of the district court. From the denial of habeas corpus relief Petitioner has pursued the instant application for a writ of certiorari.

STATEMENT OF FACTS

As noted by the Supreme Court of Georgia on the appeal taken by the Petitioner following his retrial on sentencing and the reimposition of a sentence of death, "[t]he facts surrounding the death of the victim, Roger Honeycutt, are amply set out in Burger v. State, supra and its companion case, Stephens v. State, 242 Ga. 34 (247 S.E.2d 838)(1978) and will not be repeated here." Burger v. State, 245 Ga. 458, 265 S.E.2d 796, cert. denied, 448 U.S. 913 (1980). Because the facts underlying Petitioner's reimposed sentence of death are the same as those adduced on his trial of January 23 and 24, 1978 which resulted in his conviction and original sentence of death, the transcript references in the following statement of facts are to the transcript of the original trial of January 23 through 24, 1978.

James Botsford, an army tank driver stationed at Fort Stewart, Georgia, had known Petitioner and co-indictee Thomas D. Stevens in Army Basic Training. (T. 85-88). Arriving at the Savannah Airport on September 4, 1977, Bosford telephoned the army base to ask about getting a ride from the airport to Fort Stewart. (T. 88-89). He spoke to Petitioner who told him that he and Stevens would pick him up at the airport. (T. 89). About two hours later Petitioner and Stevens arrived at the airport driving a taxicab. (T. 90). After Bostford got in, with Petitioner driving, he was told by Petitioner and Stevens that the cab was stolen. (T. 91, 95).

Stevens informed Botsford that he and Petitioner had forced the cab driver with a knife and knife sharpener to give them money, perform "unnatural acts" and then get into the car trunk. (T. 96). Although Stevens did most of the talking, Petitioner was agreeing with what was said. (T. 93). Stevens then called back to the trunk: "'Are you still there?'" Botsford heard a voice reply, "Yes sir." (T. 97). Stevens showed Botsford a knife and knife sharpener, which he put under the front seat. (T. 97).

During the ride back to Fort Stewart, Stevens called back to the trunk several times asking the cab driver if he was there. (T. 103). Botsford always heard a voice answer. (T. 103). Stevens said that he had sexually assaulted the driver and that they should kill him and burn the car. (T. 100, 101). Botsford asked Petitioner and Stevens to free the driver and he told them that he would not tell the law if they would not kill the cab driver. (T. 100-104). Petitioner and Stevens both agreed to let the driver go. (T. 100, 104).

The following evening, Botsford was visited at Fort Stewart by fellow soldiers Petitioner and Stevens who asked him if he had said anything. (T. 106). When Botsford told them he had not, they said they had freed the cab driver and ditched the car near Hinesville, Georgia. (T. 107). Prompted by a radio bulletin that he later heard regarding a missing cab driver, Botsford went to the State Patrol and the Army Criminal Investigation Department with the information he possessed. (T. 108-109).

An army investigation, John Berzenski, was notified on September 6, 1977 of a missing cab and driver. (T. 134). Berzenski and Clarence Haire, also an army investigator, found a boot on Highway 144 with the name of Roger Honeycutt inside. (T. 135, 136, 141). They found another boot, army socks, and a piece of yellow plastic approximately 200 yards within each other on Highway 144. (T. 137-138, 144-147).

Honeycutt, the missing cab driver, was an army private also stationed at Fort Stewart, Georgia. (T. 121). He drove for the D&M Cab Company on nights and weekends. (T. 120-121).

Haire questioned members of Honeycutt's unit on September 9th in an attempt to locate Honeycutt. (T. 149). One of the men he questioned was Petitioner who told him that he had a friend who called the Shuman Cab Company about 10:00 p.m. on September 4th, but that they did not take the cab when it arrived at Fort Stewart. (T. 149-150). A Shuman cab driver

testified that he did in fact get a call from Fort Stewart on September 4th, and in response thereto, he drove there accompanied by a friend. (T. 129-130). Two men asked him if he had change for $50.00, then left and did not return. (T. 130, 131). They had told him they were going to the airport. (T. 130). As the Shuman cab driver was leaving, the driver saw a D&M cab drive away from a nearby building at about 10:15 or 10:20 p.m. (T. 131).

A Jackson-Denno hearing was held outside the presence of the jury at trial to determine the voluntariness of the statement made to Investigatior Haire and Wayne County Detective F.J. Shuman. (T. 169-168). The trial court heard testimony from Haire, Detective Shuman and defense witness Dr. Joseph O'Haire, a clinical psychologist. Dr. O'Haire testified that Petitioner had a "mental deficiency" and a "psychopathic personality" that made him want to do wrong. (T. 248, 250). After hearing the testimony, the court ruled that the statements were voluntarily made. (T. 268).

The jury was returned to the courtroom and Investigator Haire testified that he interviewed the Petitioner on September 12th and advised Petitioner of the Miranda warnings. (T. 269-270). Petitioner stated that he did not want a lawyer and would answer any questions posed, after which Petitioner executed a waiver of rights form. (T. 272-273). At first, Petitioner denied any knowledge of Roger Honeycutt or Honeycutt's disappearance. (T. 276). When informed that there existed information that he had been in possession of the missing taxicab, Petitioner made a statement. (T. 278). Investigator Haire related the contents of Petitioner's statement to the court and to the jury. Petitioner stated that when he and Stevens ran out of money while drinking beer at the enlisted men's club, Stevens suggested robbing a taxicab driver. (T. 278-279). The two men summoned a Shuman Company cab, but decided not to take it when it arrived with two men

inside. (T. 279). Petitioner and Stevens then received a telephone call from Botsford, who was at the Savannah Airport, requesting a ride to Fort Stewart. Petitioner agreed to pick Botsford up at the airport. (T. 279).

Stevens and Petitioner next burglarized the dining facility where Stevens got a knife sharpener and Petitioner got a butcher knife. (T. 278). Thus armed, the two men telephoned and requested a D&M cab. (T. 280). When the cab arrived, Petitioner and Stevens asked the driver if he could change a $50.00 bill, and the driver said he could. (T. 280). Approximately fifteen miles away from the army base on Highway 144, as planned by a prearranged signal, Stevens placed the knife sharpener around the driver's neck while Petitioner put the butcher knife to the driver's ribs. (T. 280).

The driver was instructed to pull over and get out, and to give Petitioner and Stevens all of his money. When the driver gave Petitioner and Stevens only $16.00, the two asked the driver if he had more money, and when he stated that he did not, they forced the driver into the back seat of the taxi. (T. 281). Stevens then had the driver remove his boots and clothes which Stevens searched for money. (T. 281). With Petitioner driving, Stevens threw each item of the driver's clothing out of the window after it had been searched for more money. (T. 281). In addition to searching the driver and his clothing, Stevens and Petitioner also searched the automobile for money. (T. 281).

After robbing the driver and forcing him to disrobe, Stevens forced the victim to perform oral sodomy on him. (T. 282). Stevens then performed anal sodomy on the victim. (T. 282). Before they reached the airport, Petitioner and his cohort forced the bound driver into the trunk of the taxicab. (T. 282). Petitioner and Stevens then proceeded on to the Savannah Airport where they picked up their friend Botsford and bragged to him that they had stolen the taxicab and had the

bound driver secured in the trunk. (T. 283). Petitioner and Stevens, in order to convince Botsford of the truth of their story, called back to the driver, requiring that the driver respond. (T. 283). Stevens suggested that they kill the driver, but Botsford protested and asked them not to do so. (T. 284).

After dropping Botsford off at Fort Stewart, Georgia, Petitioner and Stevens drove on to Jesup, Georgia, where they careened up and down several dirt roads to make the car go "from side to side," forcing the victim to roll around in the truck. (T. 284). The two men then stopped at a convenience store where Stevens removed the taxicab's dome light and hid it in the bushes. (T. 284).

After noticing a patrol car following them for a short period of time, Petitioner and Stevens decided to get rid of the taxicab. (T. 285). The two men drove to a "borrow pit" where they had gone swimming several times in the past. Petitioner and Stevens were careful to wipe their fingerprints from every area of the taxicab. (T. 286). Afterwards, Petitioner raised the lid of the trunk and asked the victim if he was alright. The victim responded that he was, and Petitioner closed the lid of the trunk. (T. 346). Petitioner then started the automobile and drove it into the "borrow pit," jumping from it just before impact with the water. (T. 286, 289). Petitioner and Stevens waited at the scene of the murder, watching the taxicab as it slowly sunk beneath the surface of the water. (T. 286). Petitioner further stated to Investigator Haire that they had tied the victim's hands with cord cut from the taxicab's C.B. radio, and that they had thrown the radio into the bushes beside the "borrow pit." (T. 286). To Investigator Haire, Petitioner admitted that he and Stevens killed the taxicab driver to prevent him from identifying them later. (T. 287).

After completing his statement to Investigator Haire, Petitioner offered to show Haire where the borrow pit was located. (T. 89). Haire and two other men from the criminal investigation office, pursuant to Petitioner's directions, proceeded to the borrow pit. (T. 289). Shortly afterwards, Detective Mike Deal arrived at the borrow pit where the missing taxicab was ultimately recovered. (T. 152, 161). A knife and a knife sharpener were found on the right floorboard of the cab. (T. 157, 158). A body in the trunk of the car was subsequently identified as that of Roger Honeycutt. (T. 306, 308, 311). The victim's death was established as being caused by drowning. (T. 308).

Wayne County Detective F.J. Shuman testified at trial that he took Petitioner from Fort Stewart authorities to the Wayne County Jail on September 13, and advised Petitioner of the Miranda warning. (T. 319-320). Shuman and Petitioner went over Petitioner's statement to Haire word by word, and Petitioner affirmed to Shuman everything contained in the statement. (T. 322). Petitioner also added that he and a friend returned to the borrow pit to get the C.B. radio, and that the radio was in Petitioner's mother-in-law's automobile. (T. 323).

On September 14, Petitioner directed Wayne County authorities over the same route that he and Stevens had driven the stolen taxicab. (T. 325). The cab's dome sign was recovered from the bushes near a convenience store, and the yellow plastic found on Highway 144 was determined to have come from the taxicab's dome sign. (T. 326, 328, 329).

Further facts will be developed on this response as needed to further illuminate any issue raised herein.

PART TWO

REASONS FOR NOT GRANTING THE WRIT

A. PETITIONER'S CONTENTION THAT HE WAS RENDERED THE INEFFECTIVE ASSISTANCE OF COUNSEL HAS PROPERLY BEEN FOUND TO BE WITHOUT MERIT BY EVERY STATE AND FEDERAL HABEAS CORPUS COURT, THUS, THIS CONTENTION CANNOT SERVE AS A BASIS FOR GRANTING THE REQUESTED WRIT. (Contention No. 1).

On this first contention, Petitioner alleges that he was rendered the ineffective assistance of counsel in violation of the Sixth, Eighth and Fourteenth Amendments in that (1) his trial counsel allegedy labored under a conflict of interest, and (2) because trial counsel was allegedly per se ineffective for not presenting evidence on the sentencing phase of trial.

1.

Addressing first Petitioner's allegation of a conflict of interest, the Respondent notes that Petitioner contends that the state habeas corpus courts, the federal district courts and the Eleventh Circuit Court of Appeals wrongly concluded that Mr. Leaphart, Petitioner's trial and appellate counsel, did not labor under any conflict of interest. Specifically, the Petitioner argues that because Mr. Leaphart was a member of the same law firm as the attorney who represented Petitioner's co-indictee at a separate trial, a conflict of interest existed of such a magnitude as to render Mr. Leaphart's assistance ineffective. In support of his position the Petitioner cites this Court to many cases, however, the cases relied upon by the Petitioner are inapplicable as they relate to the representation at trial by one attorney of multiple

witness was to prove that Mr. Leaphart labored under a conflict of interest due to alleged inconsistent defenses possessed by Petitioner and Stevens, and due to the "disparity in involvement in the two individuals and the disparity in age . . . ." (H.T. at 6).[2] Petitioner's contention made to the district court, repeated on appeal to the Eleventh Circuit Court of Appeals, and presented now to this Court, is that Mr. Leaphart tailored his trial strategy, allegedly to the Petitioner's detriment, in order to protect Thomas D. Stevens. Contrary to Petitioner's contention, however, at the federal habeas corpus evidentiary hearing Mr. Leaphart testified that there existed no conflict of interest and that because Petitioner and Stevens received separate trials before separate juries, there existed no possibility of inconsistent defenses. (H.T. at 15, 62). Mr. Leaphart testified that he used a graph at trial upon which he listed each and every act performed by Stevens as compared to those acts performed by Petitioner so as to dramatically point out to the jury the disparity in the actions of the participants in the murder, the armed robbery, the kidnapping and the acts of sodomy, in an effort to demonstrate the greater culpability of Stevens. (H.T. at 20-23, 62-63). (Petitioner's Exhibit No. 1). On the aforementioned graph Mr. Leaphart depicted Stevens as the chief architect of the crime, with Petitioner as an alleged "follower type." (H.T. at 23). As noted by the district court, Mr. Leaphart's habeas corpus testimony was directly supported by an examination of the trial transcript at pages 257 through 262. Further, Mr. Leaphart testified that if crucifying Stevens would have helped Petitioner at trial, he would have crucified Stevens in an instant. (H.T. at 53).

In his brief to the circuit court, and here on this application for certiorari, Petitioner contends that the

---

[2]H.T.: refers to the transcript of the March 4, 1981 federal habeas corpus evidentiary hearing.

alleged conflict of interest was further manifested by Mr. Leaphart's failure to offer Petitioner's testimony against Stevens in exchange for a sentence less than death. The Petitioner fails to note for this Court's benefit, however, that at the federal habeas corpus evidentiary hearing Mr. Leaphart specifically testified that notwithstanding his attempt at plea negotiations the district attorney, confronted by a brutal and heinous murder and armed with sound confessions from the Petitioner, flatly refused to even discuss plea negotiations. (H.T. at 65).

> Q. Did you ever engage in any plea neogitations in this case?
>
> A. Yes.
>
> Q. Could you tell me the substance of it?
>
> A. Well, we -- I constantly all during the time I represented Mr. Burger tried to negotiate a plea with the district attorney for a life sentence and, he -- during the first trial he just flatly refused to even discuss it in any terms. And, then when we got it reversed on the sentence feature I continued to -- in that time to try to negotiate with the -- with the district attorney about entering a plea, for Mr. Burger to serve a life sentence and, he insisted on trying it and insisted on seeking the death penalty.

(H.T. at 65). As the foregoing readily reveals, contrary to Petitioner's misrepresentations, the district attorney, in a proper exercise of his discretion, completely foreclosed any possibility of plea negotiations.

Also lacking in substance is Petitioner's contention that as a result of some, still as yet unidentified conflict of

interest, Mr. Leaphart failed to properly brief and argue Petitioner's case on direct appeal. Again, Petitioner curiously and conspiciously fails to note that it was Mr. Leaphart's actions as appellate counsel which resulted in the Supreme Court of Georgia's first opinion vacating Petitioner's originally imposed sentence of death. See Burger v. State, 242 Ga. 28, 247 S.E.2d 834 (1978).

Having completely failed to present at the federal habeas corpus hearing any evidence of the existence of an acutal conflict of interest, the Petitioner on appeal to the circuit court, as on this application to this Court, invites this Court to engage in unwarranted speculation and assume the existence of some conflict based upon Mr. Leaphart's failure to argue Petitioner's alleged less culpability on direct appeal to the Supreme Court of Georgia. Again, Respondent notes that Petitioner has curiously failed to inform this Court that while Petitioner did not engage in the actual acts of oral and anal sodomy committed on the victim, the Petitioner did participate in the planning and the actual armed robbery and the kidnapping of the victim. Although Mr. Leaphart commendably attempted to portray Petitioner as the less culpable party before the jury, the fact remains that it was Petitioner who sadistically raised the lid of the trunk of the taxicab, inquired of the victim's well being, then closed and locked the trunk before driving the taxicab into the borrow pit. The evidence is undisputed that it was Petitioner who was the actual murderer. To argue that Mr. Leaphart's failure to contend on appeal that Petitioner, the actual murderer, was the culpable party, constitutes evidence of the existence of an actual conflict of interest, borderes on the absurd.

As correctly noted by every reviewing court below, and concluded by the district court, "[t]he facts thus present no inference of any conflict of interest actual or potential." Blake v. Zant, 513 F.Supp. 722, 796 (S.D. Ga. 1981).

Secondly, with reference to Mr. Leaphart's alleged ineffectiveness, Petitioner contends that Mr. Leaphart failed to investigate or prepare for the penalty phase of trial. The legal background against which Petitioner's allegation is to be examined is well settled. A criminal defendant is entitled to effective assistance of counsel under the Sixth Amendment and due process clause of the Fourteenth Amendment. See Gideon v. Wainwright, 372 U.S. 335 (1963); Powell v. Alabama, 287 U.S. 45 (1932). Effective assistance of counsel, such as will satisfy the requirement of the Sixth Amendment, is counsel "reasonably likely to render and rendering reasonably effective assistance given the totality of the circumstances." Washington v. Strickland, 693 F.2d 1243, 1250 (5th Cir. Unit B 1982)(en banc), cert. granted, ___U.S.___, 103 S.Ct. 2451, 77 L.Ed.2d 1332 (1983). See United States v. Killian, 639 F.2d 206, 210 (5th Cir.), cert. denied,451 U.S. 1021, 101 S.Ct. 3014, 69 L.Ed.2d 394, (1981); Mays v. Balkcom, 631 F.2d 48, 52, n.1 (5th Cir. 1980). Respondent further notes that in a capital case the standards for judging effective assistance of counsel remain the same as in any other case, and that the seriousness of the charges against the defendant is simply a factor that must be considered in accessing counsel's performance. Stanley v. Zant, 697 F.2d 955, 962-963 (11th Cir. 1983). See Proffit v. Wainwright, 685 F.2d 1227, 1247 (11th Cir. 1982). Under the circuit court's holding in Washington v. Strickland, 693 F.2d at 1262, in the Eleventh Circuit Court of Appeals a defendant convicted in a state court bringing a habeas corpus petition in federal court ordinarily must show that his counsel's ineffectiveness, if proven, resulted in actual and substantial disadvantage to the course of his defense at trial. As is readily apparent, assuming a petitioner's ability to demonstrate the ineffectiveness of his counsel, petitioner still bears the burden of meeting the prejudice requirement of Washington v. Strickland, supra.

With the foregoing in mind, Respondent now turns to the facts of the instant case. Contrary to the Petitioner's contentions, Mr. Leaphart testified at the federal habeas corpus evidentiary hearing that in addition to his investigation of the actual facts surrounding the commission of the crimes and the Petitioner's involvement therein, he also investigated Petitioner's background. (H.T. at 35, 37). In pursing this phase of his investigation Mr. Leaphart acquired several reports from, and conversed with psychologists in Indianapolis who had examined the Petitioner on prior occasions. (H.T. at 35, 50). Mr. Leaphart spoke by telephone and conducted several personal interviews with the Petitioner's mother. (H.T. at 36). Blake v. Zant, 513 F.Supp. at 796 n.6.

Mr. Leaphart testified that he explained to the Petitioner and to the Petitioner's mother the purpose of the retrial on sentencing and the fact that he could "generally put up anything you can find that is good about anybody in mitigation of the sentence." (H.T. at 36). Mr. Leaphart further testified that his background investigation revealed that prior to entering the Army the Petitioner had been the victim of a broken home, had been in trouble with the police in Florida after which the Petitioner had gone back north to live where he got in trouble with police again. (H.T. at 38). Mr. Leaphart further testified that he questioned Petitioner's mother regarding the existence of potential witnesses that might be used on the sentencing phase of trial. (H.T. at 44). Mr. Leaphart also located and discussed the Petitioner's case with an attorney the Petitioner had allegedly lived with. (H.T. at 44). Mr. Leaphart also testified that his conferences with the Petitioner's mother produced very little helpful evidence that could have been used on the sentencing phase of trial. (H.T. at 64). Throughout his investigation Mr. Leaphart was unable to locate the Petitioner's father, nor did any other member of the Petitioner's family contact Mr. Leaphart or come forward, nor offer their testimony. (H.T. at 64).

Prior to trial Mr. Leaphart explained to the Petitioner the nature of the proceedings, how to dress and the proper demeanor for Petitioner to display at trial. (H.T. at 65-66). The Petitioner was advised of his rights and was specifically advised of his right to take the witness stand and testify in his own behalf. Mr. Leaphart testified that he discussed with the Petitioner the issue of whether the Petitioner should take the stand on the sentencing phase. (H.T. at 66). In this regard Mr. Leaphart testified that notwithstanding the harm that would have resulted from subjecting the Petitioner to cross-examination by the district attorney, Mr. Leaphart was even more concerned with the harmful effects upon the jury of the Petitioner's gloating, indifferent and sadictic attitude.[3] (H.T. at 66). Mr. Leaphart also testified that he did not place the Petitioner on the witness stand because the Petitioner was unpredictable and he did not know what he would say. (H.T. at 69). Mr. Leaphart further testified that in light of the unfavorable testimony that might be brought out on cross-examination of the Petitioner's mother, i.e., Petitioner's prior encounters as a defendant with the criminal justice system, the potential harm to the Petitioner far outweighed the limited positive testimony that could have been elicited. (H.T. at 68). Obviously, such a strategic decision is of the type generally afforded all trial counsel.

Here on this application for a writ of certiorari new counsel for Petitioner essentially contends that had he been counsel at trial he would have handled matters differently. Notwithstanding counsel's assertions, Mr. Leaphart is not rendered ineffective merely because counsel here in habeas corpus, with the benefit of the infinite wisdom of hindsight, differs with the strategy used at trial. Contrary to the

---

[3]In this regard the Respondent notes that at the federal habeas corpus evidentiary hearing even counsel for the Petitioner on this application did not call Petitioner as a witness in his own behalf.

Petitioner's contentions, Mr. Leaphart's testimony at the federal habeas corpus evidentiary hearing revealed that he was thoroughly familiar with Petitioner's background and that he made a reasoned tactical decision not to put the Petitioner or Petitioner's mother on the witness stand so as to keep from the jury, on cross-examination, testimony regarding the Petitioner's past criminal history. In this regard, the district court and the circuit court properly concluded that the Petitioner's contentions that Mr. Leaphart failed to investigate and prepare for the sentencing phase of trial were all without merit.

In concluding this response to the second portion of Petitioner's Contention No. 1, Respondent notes that on this application, as in the district court and before the circuit court, counsel for the Petitioner essentially argues that any trial attorney who fails to place the criminal defendant on the witness stand during the sentencing phase of a capital case has rendered ineffective assistance of counsel, notwithstanding the defendant's background or the trial strategy utilized by defense counsel. Due to the inherent nature of capital litigation, it is the observation of Respondent's counsel that had Mr. Leaphart placed the Petitioner on the witness stand during the sentencing phase of trial, and had Mr. Leaphart used the "lukewarm" character testimony advocated by the Petitioner in the district court below, Petitioner would just as vigorously argue before this Court that Mr. Leaphart had rendered the ineffective assistance of counsel by so placing the Petitioner on the witness stand, thus subjecting him to a damaging cross-examination, and for using the "lukewarm" character testimony presently presented and advocated by Petitioner. Obviously, the foregoing assumes that such testimony would have been made available to defense counsel at trial, which assumption is not only unsupported by the evidence

adduced at the March 4, 1981 federal habeas corpus evidentiary hearing, but is directly contradicted by the same. As noted by the district court at Blake v. Zant, 513 F.Supp. 772, 802 n. 13 (S.D. Ga. 1981):

> However, many, if not all, the allegations made against Mr. Leaphart are directly contradicted by the record. Thus, they could not possibly be of any benefit to Mr. Burger. On the other hand, the raising of such unfounded charges must have a significant "chilling effect" on the willingness of experienced attorneys, like Mr. Leaphart, to undertake the defense of capital cases. Petitioner's attorneys here might do well to reconsider their apparent policy of routinely attacking the performance of trial counsel in light of this fact.

Respondent notes that it appears inherent in capital litigation that no matter the quality or nature of the assistance rendered by defense counsel at trial, counsel in habeas corpus will routinely contend that the same was ineffective. The instant case constitutes such an example, and Petitioner's contentions of the alleged ineffective assistance of counsel, as the same are totally without merit, cannot serve as the basis of the granting of the requested writ.

B. PETITIONER'S CONTENTION THAT IN GODFREY V. GEORGIA, 446 U.S. 420 (1980), THIS COURT RULED O.C.G.A. § 17-10-30(b)(7), FORMER GA. CODE ANN. § 27-2534.1(b)(7) TO BE UNCONSTITUTIONAL ON ITS FACE, IS DERIVED FROM A MISREADING OF GODFREY V. GEORGIA, SUPRA, AND THUS, CANNOT SERVE AS A BASIS FOR GRANTING THE REQUESTED WRIT. (Contention No. 2).

On this second contention, Petitioner alleges that "a death sentence based solely on § (b)(7), such as Christopher Burger's cannot stand," because in Zant v. Stephens, ___ U.S. ___, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983) this Court "made clear" its ruling in Godfrey v. Georgia, 446 U.S. 420 (1980) that O.C.G.A. § 17-10-30(b)(7), former Ga. Code Ann. § 27-2534.1(b)(7), is unconstitutional on its face. In support of his misreading of Godfrey v. Georgia, supra, Petitioner cites this Court to footnote 4 of Zant v. Stephens, supra at 2737. In the aforementioned footnote, this Court stated:

> Thus, this case does not implicate our holding in Godfrey v. Georgia, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980), that the (b)(7) aggravating circumstance as construed by the Georgia Supreme Court was unconstitutionally broad and vague.

In footnote 4 of its opinion in Zant v. Stephens, supra, this Court merely made reference to the fact that of the three statutory aggravating circumstances given to Stephens' jury in charge on the sentencing phase of trial, the jury did not return a finding of the § (b)(7) statutory aggravating circumstance. In this regard, in footnote 4 cited above, this Court merely noted that "this case does not implicate our holding in Godfrey v. Georgia, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980), . . . "

An examination of the relevant portions of this Court's opinion in Godfrey v. Georgia, supra, readily reveals the fact that Petitioner has lifted out of context footnote 4 of this

Court's opinion in Zant v. Stephens, supra and cited the same in support of his argument that in Godfrey v. Georgia, supra, this Court ruled the § (b)(7) statutory aggravating circumstance to be unconstitutional on its face.

In pertinent part, O.C.G.A. § 17-10-30(b)(7) provides as follows:

> The offense of murder, . . . was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim.

In Godfrey v. Georgia, supra, the jury recommended imposition of a sentence of death based upon a partial finding of the § (b)(7) statutory aggravating circumstance, i.e., "that the offense of murder was outrageously or wantonly vile, horrible and inhuman." Id. at 426. Confronted with such a partial finding of the § (b)(7) statutory aggravating circumstance, this Court opined in Godfrey v. Georgia, supra that "[t]here is nothing in these few words, standing alone, that applies any inherent restraint on the arbitrary and capricious infliction of the death sentence." Id. at 428.

Respondent notes that an examination of Godfrey v. Georgia, supra, readily reveals that in the aforementioned case this Court found that the application of a partial finding of the § (b)(7) statutory aggravating circumstances did not serve to properly circumscribe the class of persons eligible for the death penalty. As applied to the particular facts of Godfrey's case, this Court found that the partial application of the § (b)(7) statutory aggravating circumstances was unconstitutional. Contrary to Petitioner's contentions on the instant petition for a writ of certiorari, this Court did opine in Godfrey v. Georgia, supra, that the § (b)(7) statutory aggravating circumstance was unconstitutionally vague on its face. Accordingly, this contention cannot serve as the basis for the granting of the requested writ.

C. PETITIONER'S CONTENTION THAT THE TRIAL COURT'S CHARGE IMPERMISSIBLY SHIFTED THE BURDEN OF PROOF ON THE ISSUE OF CRIMINAL INTENT HAS BEEN PROPERLY FOUND TO BE TOTALLY WITHOUT MERIT BY EVERY STATE AND FEDERAL REVIEWING COURT, ACCORDINGLY, THIS CONTENTION CANNOT SERVE AS THE BASIS FOR THE GRANTING OF THE REQUESTED WRIT.

On this final contention, Petitioner first alleges that this Court should grant a writ of certiorari based upon its recent grant of the writ in Koehler v. Engle, 707 F.2d 241 (6th Cir. 1983), cert. granted, ___ U.S. ___, 104 S.Ct. 231 (1983). Koehler v. Engle, supra, however, is readily distinguishable from the instant case. In Koehler v. Engle, 707 F.2d at 241, the jury was instructed that "malice is implied from any deliberate and cruel act against another person, however sudden." Further, the jury was instructed that " . . . the law gives us a rule of thumb that a person is presumed to intend the natural consequences of his acts." At no point in the trial courts charge was Engle's jury instructed that the foregoing presumptions were rebuttable. Further, only general instructions on the presumption of innocence and the prosecution's burden of proof beyond a reasonable doubt were given in a case where Engle's sole defense was temporary insanity occasioned by the effects of alcohol, drugs and a disassociative reaction, a temporary mental disorder which is often accompanied by memory loss.

In the instant case, unlike in Koehler v. Engle, supra, Petitioner's jury was specifically informed that "a person will not be presumed to act with criminal intention, but the jury may find such contention upon consideration of the words, conduct, demeanor, motive, and all other circumstances connected with the act for which the accused is prosecuted."

(T.T. at 409). This Petitoner's jury was further instructed that each and every presumption given in charge was rebuttable. Petitioner's jury was charged that a specific intent to commit the crime of murder is an essential element that the state bore the burden of proof upon beyond a reasonable doubt. Further, Petitioner's jury was charged that "intent may be shown in many ways, provided the jury finds that it existed from the evidence produced before you. It may be inferred from the proven facts, or by acts and conduct, or it may be presumed if it is the natural and necessary consequences of the act." (T.T. at 410-411). With specific reference to the immediately preceding last phrase of the trial court's charge, the trial court had previously and specifically charged that each and every presumption given was rebuttable.

As the foregoing readily reveals, unlike the circumstances in Koehler v. Engle, supra, the trial court's charge in the instant case, when properly construed as a whole, reveals that the same created nothing more than a permissible inference on the issue of intent, which inference the Petitioner's jury was free to draw or not to draw. Thus, this Court's granting of certiorari in Koehler v. Engle, supra, has no impact upon this case.

Next, Petitioner contends that the trial court's instruction on the issue of intent is in conflict with this Court's holding in Sandstrom v. Montana, 442 U.S. 510 (1979). Addressing specifically this allegation, Respondent notes that the trial court's charge is located at pages 410-411 of the trial transcript. In this instant case, the Petitioner was indicted, tried, and convicted of the crime of malice murder. In pertinent part, O.C.G.A. § 16-5-1 defines the offense of murder as follows:

> A person commits murder when he unlawfully and with malice aforethought, either express or implied, causes the death of another

> human being. Express malice is that deliberate intention unlawfully to take away the life of a fellow creature which is manifested by external circumstances capable of proof. Malice shall be implied where no considerable provocation appears, and where all the circumstances of the killing show an abandoned and malignant heart.

As an examination of the foregoing code section reveals, under Georgia law, an individual commits malice murder when he (1) unlawfully (2) with malice aforethought (3) causes the death of another human being. Under the foregoing analysis, the unlawful intent to kill is an integral part of an essetial element of murder, i.e., malice aforethought, and in this regard the jury was so charged.

At the onset of his instructions to the jury, the trial court specifically informed Petitioner's jury that:

> I charge you that the defendant enters upon the trial of this case with the presumption of innocence in his favor and that presumption remains with him throughout the trial and until the state shall introduce sufficient evidence in your presence and hearing to convince your minds beyond a reasonable doubt as to his guilt. (T.T. at 404)

* * *

> A person will not be presumed to act with criminal intention, but the jury may find such contention upon consideration of the words, conduct, demeanor, motive and all other circumstances connected with the act for which the accused is prosecuted. (T.T. at 409).

Thus, at the outset of the trial court's instructions, Petitioner's jury was thoroughly apprised of the defendant's presumption of innocence and the state's burden of proving every element of the crime charged beyond a reasonable doubt. Regarding the natural and necessary consequences of one's acts, the trial court gave the following charge.

> Now, by definition, ladies and gentlemen, in our state a crime is a violation of a statute of this state in which there shall be a union of joint operation of act, or omission to act, and intention, or criminal negligence. I give you certain presumptions of law that are applicable to this case.
>
> A presumption is a conclusion which the law draws from given facts. Each of these presumptions are rebuttable. That is, they are subject to being overcom by evidence to the contrary.
>
> I charge you now the presumptions that are rebuttable. Every person is presumed to be of sound mind and discretion. The acts of a person of sound mind and discretion are presumed to be the product of the person's will. A person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts. A person will not be presumed to act with criminal intention but the jury may find such contention upon consideration of the words, conduct, demeanor, motive and all other circumstances connected with the act for which they (sic) accused is prosecuted.

> A specific intent to commit the crime charged in this indictment is an essential element that the state must prove beyond a reasonable doubt. Intent is always a question for the jury, and is ordinarily ascertained by acts and conduct. Intent may be shown in many ways, provided the jury finds that it existed from the evidence produced before you. It may be inferred from the proven facts, or by acts and conduct, or it may be presumed when it is the natural and necessary consequences of the act. (T.T. at 410-411).

It is with regard to the immediately preceding phrase, " . . . or it may be presumed when it is the natural and necessary consequences of the act," that Petitioner contends his constitutional rights were violated in that the subject charge allegedly relieved the state of its burden of proof on the element of criminal intent.

As correctly noted by the district court, and affirmed by the circuit court, there exists no per se rule against charging the truism that a person is normally presumed to intend the natural and probable consequences of his actions. United States v. Chiantese, 560 F.2d 1244, 1255-1256 (5th Cir. 1977). Thus, as stated by this Court in Sandstrom v. Montana, 442 U.S. 510 (1979), citing Ulster County Court v. Allen, 442 U.S. 140 (1979), "[t]he threshold inquiry in ascertaining the constitutional analysis applicable to this kind of jury instruction is to determine the nature of the presumption it describes." Id. at 514. In this regard, this Court stated that:

> That determination requires careful attention to the words actually spoken to the jury (cite omitted), for whether a defendant has been afforded his

constitutional rights depends upon the way in which a reasonable juror could have interpreted the instruction.

Sandstrom, supra at 514.

In Ulster County Court, supra, this Court stated:

> Inferences and presumptions are a staple of our adversary system of fact finding. It is often necessary for the trier of fact to determine the existence of an element of the crime - that is, an "ultimate" or "elemental" fact - from the existence of one or more "evidentiary" or "basic" facts. (cites omitted).
>
> The value of these evidentiary devices and their validity under the due process clause, vary from case to case, however, depending on the strength of the connection between the particular basic and elemental facts involved and on the degree to which the device curtails the fact finders' freedom to assess the evidence independently. Nonetheless, in criminal cases, the ultimate test of any device's constitutional validity in a given case remains constant: the device must not undermine the fact finder's responsibility at trial, based on evidence adduced by the state, to find the ultimate facts beyond a reasonable doubt.

Id. at 156.

In Ulster County Court, supra, this Court defined a permissive persumption or inference as follows:

> The most common evidentary device is the entirely permissive inference or presumption, which allows - but does not require, the trier of fact to infer the elemental fact from proof by the prosecutor of the basic one and that places no burden of any kind on the defendant.

Id. at 157.

With regard to mandatory presumptions this Court stated the following:

> . . . it tells the trier that he or they must find the elemental fact upon proof of the basic fact, at least unless the defendant has come forward with some evidence to rebut the presumed connection between the two facts.

(Emphasis added). Id. at 1257.

Upon a challenge to the constitutionality of an instruction which creates a permissive presumption or inference, the Court stated that the party challenging such an instruction must demonstrate its invalidity as applied to him, i.e., he must demonstrate that under the facts of the case, there is no rational way the trier could make the connection permitted by the inference. Id. at 157.

Upon a challenge to the constitutionality of a mandatory presumption, this Court stated that such a presumption is usually examined "on its face to determine the extent to which the basic and elemental facts coincide." For a mandatory presumption to pass constitutional muster, there must be "a 'rational connection' between the basic facts that the prosecution proved and the ultimate fact presumed, and the latter is 'more likely than not to flow from' the former." Ulster County Court, supra, at 165. Accord, Hammondtree v.

Phelps, 605 F.2d 1371 (5th Cir. 1979). With the foregoing propositions in mind, the Respondent notes that in Skrine v. State, 244 Ga. 520, ___ S.E.2d ___ (1979), the Supreme Court of Georgia addressed itself to an identical challenge to the subject charge, and in light of Sandstrom v. Montana, and Ulster County Court, concluded that the charge challenged, when properly viewed as a whole, created nothing more than a mere permissive presumption which "'allows - but does not require - the trier of fact to infer the elemental fact from proof by the prosecutor of the basic one, and that places no burden of any kind on the defendant.'" Skrine, supra at 521.

Respondent notes that construing the charge as a whole, as required by Cupp v. Naughten, 414 U.S. 141 (1973) every state and federal reviewing court concluded that the same created nothing more than a mere permissive presumption, and thus, the district court and the circuit court properly analyzed the subject charged under the "rational connection test." Succinctly stated by the district court, "[t]he proper question thus becomes whether there was a rational basis under which the jury might infer criminal intent from the defendant's actions with respect to the murder." Blake v. Zant, 513 F.Supp. at 973. In this regard, the district court correctly opined that:

> The evidence, of course, indicated that Mr. Burger raised the trunk lid of the victim's taxicab and specifically asked him if he were alright. Mr. Burger himself then drove the vehicle directly into the pit where it submerged, drowning Private Honneycutt. There can be no real doubt as to whether there exists a rational basis by which the jury could conclude that this course of conduct was intended by the Petitioner. Furthermore, these circumstances, as well as other evidence in the record clearly provide

> ample basis to support a conviction independent of any presumption. 442 U.S. at 160. Nor does it appear that any problem would be created by replacement of the rational relationship tests by a more stringent "reasonable doubt" standard. See Barnes v. United States, 412 U.S. 837, 842-43 (1978). Here, it seems entirely clear that the facts upon which the presumption is founded are sufficient to support an inference of intent to kill beyond a reasonable doubt. See Ulster County, supra at 166.

Blake v. Zant, 513 F.Supp. at 793.

Respondent notes that in addition to the general charge on presumption of innocence and the state's burden of proof beyond a reasonable doubt on each and every element of the crime charged, Petitioner's trial court was careful to specifically charge that the Petitioner would not be presumed to act with criminal intention that intent was an essential element of the crime charged that the state must prove beyond a reasonable doubt, that the presumption referred to in the "natural consequences" instruction was rebuttable, and with reference to the specific location of the relevant portions of the trial court's charge, immediately following the "natural consequences" instruction the trial court again charged the jury that a person will not be presumed to act with criminal intention. As succinctly stated by the district court:

> In sum, the trial court's charge does not appear to create any real possibility of impermissible-shifting. The situation condemned in Chiantese, Mann [Mann v. United, 319 F.2d 404 (5th Cir. 1963)] and Sandstrom is simply not present here.

> Instead, the challenged instructions specifically remind the jury that the burden of proof remains at all times on the state. These instructions create only a permissive inference which the jury is left free to accept or reject in accord with its view of the evidence. Furthermore, it appears that this evidence amply supports the inference whether evaluated under a "rational basis" or a "reasonable doubt" test. Accordingly, Petitioner's claim of error is without merit.

Blake v. Zant, 513 F.Supp. at 973-794.

Finally, in support of his third contention, Petitioner alleges that this Court should grant certiorari to resolve the issue of whether a Sandstrom violation can properly be found to constitute harmless error, which issue was left unresolved in Connecticuit v. Johnson, ___ U.S. ___, 103 S.Ct. 969 (1983), and that this Court should use this case as a vehicle to eleviate perceived ambiguities by the lower courts regarding alleged Sandstrom violations. Contrary to this Court's long standing tradition of not rendering advisory opinions and deciding cases on constitutional grounds only when there exist other adequate grounds for resolution, Petitioner advocates that this Court should grant certiorari and, in a cavalier manner, set itself about the business of righting every conceivable constitutional violation that might be engendered by a burden-shifting charge. Quite wisely, this has never been the Court's attitude regarding its function in the judicial process. Petitioner's advocation of a "new approach" to constitutional litigation is unwise and untenable.

For all the above and foregoing reasons, Petitioner's contention number three cannot serve as the basis for the granting of the requested writ.

CONCLUSION

This Court should refuse to grant a writ of certiorari to the Eleventh Circuit Court of Appeals as it is manifest that no substantial federal question not previously decided by this Court is presented and the decision sought to be reviewed, in addition to being demonstrable in accord with the applicable decisions of this Court, is soundly based upon a proper construction of federal law.

Respectfully submitted,

MICHAEL J. BOWERS
Attorney General

JAMES P. GOOGE, JR.
Executive Assistant Attorney General

Marion O. Gordon

MARION O. GORDON
First Assistant Attorney General

Susan V. Boleyn

SUSAN V. BOLEYN
Assistant Attorney General

William B. Hill, Jr.

WILLIAM B. HILL, JR.
Senior Assistant Attorney General

Please serve:

WILLIAM B. HILL, JR.
132 State Judicial Bldg.
40 Capitol Square, S. W.
Atlanta, Georgia 30334
(404) 656-3359

CERTIFICATE OF SERVICE

I, William B. Hill, attorney of record for the Respondent and a member of the bar of the Supreme Court of the United States certify that in accordance with the rules of the Supreme Court of the United States, I have this day served a true and correct copy of this brief for the Respondent in opposition upon the Petitioner's attorney, by depositing a copy the same in the United States Mail with proper address and adequate postage to:

Joseph M. Nursey
Millard C. Farmer
P. O. Box 1978
Atlanta, Georgia 30301

This 19th day of March, 1984.

WILLIAM B. HILL, JR.